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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 407

SIDNEY KROSS,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF LOS ANGELES COUNTY, STATE OF CALIFORNIA.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, SIDNEY KROSS, respectfully represents the following:

A

Summary Statement of Matter Involved

The petitioner, Sidney Kross, was convicted on July 20, 1951, of the crimes of grand theft, in two counts, and burglary in the second degree, in two counts, after trial before the Hon. Philip H. Richards and a jury in the

Superior Court, Los Angeles County, State of California (Fol., 113-116, 123).

On September 14, 1951, the petitioner, Sidney Kross was sentenced to the State Prison, at San Quentin, California, for the term prescribed by law as to each count upon which he was convicted, all sentences to run concurrently with each other (Fol., 121).

Petitioner Kross was released on bail in the amount of $7500 pending an appeal of the judgment of conviction and the order denying a new trial (Fol., 122).

On August 8, 1952, the District Court of Appeals, Second District, State of California unanimously affirmed, with an opinion (Fol., 986-999) the judgment of conviction and the order denying a new trial.

On September 4, 1952, the Supreme Court of the State of California, by a majority of the Court with two justices dissenting, denied the defendant's petition for a hearing (Fol., 1000).

On September 25, 1952, Mr. Justice Clark of the Supreme Court of the United States granted a stay of execution of sentence, pending a determination of this application.

On October 17, 1952, Mr. Justice Clark by an amendment to his order of September 25, 1952, fixed bail in the amount of $7500 for the petitioner, conditioned upon the bail bond in that amount being approved by the judge of the Superior Court, County of Los Angeles, State of California, and thereafter being posted with the Clerk of that Court.

The bail bond has been approved and posted in accordance with the directions in the order of Mr. Justice Clark and the petitioner is presently at liberty, pending the determination of this petition.

B

The Crime Charged

The information filed in the Superior Court of the County of Los Angeles, State of California by the District Attorney of Los Angeles County, charged the petitioner, Sidney Kross, with grand theft in two counts and burglary in two counts (Fol., 1-5).

C

Question Presented

Whether the rights of a defendant to be accorded due process of law under the provisions of the Fourteenth Amendment of the Constitution have been invaded and violated under the following circumstances:

(a) During the course of the trial, just after the trial justice had hurriedly left the bench for a short recess leaving at least four jurors in the jury box, a group of newspaper photographers and television cameramen rushed to the petitioner at the counsel table (Fol., 739-748); the said photographers and newsmen made a number of highly detrimental and prejudicial remarks to petitioner in trying to induce him to be photographed; their comments, all within the observation and hearing of the said four jurors, were in substance, as follows:

> "Come on, let's take your face and your baggy pants together. What are you hiding your face for? Come on, lift it up and let's take a picture of you. What is the matter with you? The jury will think you are guilty. These pictures of you hiding your face won't do you any good with the jury. Let's see your face" (Fol., 740).

Many other remarks were made and epithets hurled which are too numerous to mention herein; at all times herein

mentioned, the bailiff and the Deputy District Attorney prosecuting the case were present and aware of the event, but did nothing to protect petitioner's rights (Fol., 250, 744, 746); the Deputy District Attorney stipulated that the said four jurors were in the Courtroom when the foregoing occurred (Fol., 743) and the petitioner's affidavit setting forth the comments in issue stood uncontradicted by the said prosecution; in the light of the wholly circumstantial nature of the case presented by the prosecution, as appears from the whole record, petitioner's counsel moved first for a mistrial (Fol., 248) then for a new trial (Fol., 735) both motions being denied by the trial justice (Fol., 252, 735, 749) who had theretofore, in chambers, told defense counsel that he would grant a new trial (Fol., 746).

D

Brief Summary of the Facts

The witnesses for the prosecution testified that on February 15, 1951, at about 11:40 A. M., the defendant entered the establishment of Robert Walsh, a wholesale fur dealer in Los Angeles, wearing a top coat, although the day was quite warm (Fol., 989). The defendant allegedly identified himself by the name of Feinberg and state he was waiting for his wife (Fol., 989). No one saw the defendant actually leave the premises (Fol., 989) and shortly after his exit, upon an inventory being taken in the storage vault, two mink cape stoles and a fur neck piece were found to be missing (Fol., 989). No one ever placed the defendant in the storage vault and the fur pieces in question were never produced.

On the same day at about 12:50 in the afternoon, the defendant, according to the people's witnesses, presented himself at the office of the Giba-Friedman Fur Company in

Los Angeles, and asked if his wife, "Mrs. Lawine" had arrived and upon being informed that she had not, proceeded to wait and acted in a suspicious manner (Fol., 990). The defendant left after a while and the next day when an inventory was taken in the storage room, two mink stoles were allegedly missing (Fol., 990). These two fur pieces were never produced.

The defendant was apprehended the following day after he was seen by Robert Walsh, the owner of the first wholesale fur establishment he allegedly had visited the day before (Fol., 991, 992). None of the fur pieces purportedly missing were found on the defendant, nor were they ever produced in the Courtroom during the trial. The defendant's clothing upon being examined was found to contain numerous hairs (Fol., 992) which upon being mounted and compared to mink and stone marten hairs, were testified to as being similar by the police chemist (Fol., 992, 993).

The defendant himself did not testify but produced a fur expert of many years' experience who was critical of the police chemist's mounting of the hairs by reason of which he could not make comparisons (Fol., 993).

The conviction of the defendant was thus obtained by means of weak circumstantial evidence. The proposition therefore, as to whether the Trial Court erred in failing to grant the motion for a mistrial, or order a new trial by reason of the misconduct of the newspaper and television photographers, toward the petitioner in the presence of at least four jurors becomes that much more important.

As was stated in *Lyons* v. *State of Oklahoma,* 322 U. S. 596, 601-2:

> "The federal question presented is whether the failure to grant a mistrial or new trial constituted a violation of the due process clause of the Fourteenth Amendment which requires that state criminal proceedings

'shall be consistent with the fundamental principles of liberty and justice.' "

Herbert v. *Louisiana*, 272 U. S. 312;
Mooney v. *Holohan*, 294 U. S. 103;
Buchalter v. *New York*, 319 U. S. 427.

E

Circumstances under Which A Fair Trial Was Denied to the Petitioner

The undisputed facts prove that the prejudicial misconduct and comments to the defendant in the Courtroom, took place in the presence of at least four jurors. This violation of the due process clause of the Fourteenth Amendment to the Federal Constitution was urged at the trial and upon appeal by the petitioner.

The Brief attached hereto will disclose more particularly why the petitioner was deprived of the constitutional guarantee of a fair and impartial trial.

F

Grounds upon Which the Jurisdiction of the Court Is Invoked

We respectfully submit that this Court has jurisdiction to entertain this petition for a writ of certiorari by virtue of Section 1257 of Title 28 U. S. Code, and Rule 38 of the Rules of The Supreme Court of the United States.

At the trial and on his unsuccessful appeal to the District Court of Appeals, Second District, State of California, the petitioner, invoking the protection of the Fourteenth Amendment of the United States Constitution, sought a new trial and reversal of the judgment of conviction, by reason of the denial of due process of law during the course of his trial. The same ground was urged on a petition for a rehearing

before the same District Court of Appeals, Second District, State of California and for a hearing before the Supreme Court of the State of California, which was denied, with two justices of the latter tribunal dissenting and voting to grant a hearing.

G

Reasons Relied upon for the Allowance of the Writ

The Superior Court of Los Angeles County, State of California, the District Court of Appeals, Second District, State of California, have all in effect decided a federal question of substance in a way "probably not in accord with applicable decisions of this Court" (Rule 38 of the Rules of the Supreme Court), in holding that the rights of petitioner Kross under the Fourteenth Amendment of the Constitution of the United States had not been violated or denied, by reason of the failure to grant a mistrial, order a new trial and reverse the judgment of conviction, predicated on the uncontroverted prejudicial conduct and statements against the petitioner by certain persons in the presence of jurors during the course of the trial.

See:

Lyons v. *Oklahoma*, 322 U. S. 596;
Stroble v. *California*, 343 U. S. 181;
Herbert v. *Louisiana*, 272 U. S. 312;
Mooney v. *Holohan*, 294 U. S. 103;
Buchalter v. *New York*, 319 U. S. 427.

Although this Court has enunciated and often reiterated the rule that the constitutional guaranty of "due process of law" in the Fourteenth Amendment forbids a State from depriving a defendant in a criminal proceeding of the essential rights of a fair trial unimpaired by any outside inter-

ference, such well established rule of law was ignored or overlooked in the instant situation.

The very situation as confronted the petitioner and the possible danger to the essential rights of the accused was undeniably responsible for the enactment of Rule 53 of Federal Rules of Criminal Procedure which reads:

> "*Rule 53 Regulation of Conduct in the Court Room*— The taking of photographs in the Court room during the progress of judicial proceedings or radio broadcasting of judicial proceedings from the Court room shall not be permitted by the Court."

To the same effect see:

> McKinney's Consolidated Laws of New York, Civil Rights Law, Section 52.

Surely it is in contravention of "due process of law" that a defendant, who is reluctant to have his photograph taken, in the very Courtroom in which he is being tried in accordance with the American concept of justice, is cajoled and actually prejudiced by strangers to the trial, all within the presence of some of the jurors who are passing upon his innocence or guilt.

Any defendant under similar circumstances is helpless and unless the Court takes some affirmative action in protecting his essential rights, he is utterly without recourse. In the instant matter the Court could have and should have protected the rights of the accused by granting a mistrial or new trial in order to insure the defendant of a fair trial, without any doubt of prejudice against him as a result of the occurrence in the Courtroom.

Is there not good and sufficient reason for allowing the writ of certiorari in the case at bar, if only to permit the defendant to have a new trial, so that his innocence or guilt can be determined solely on the evidence, without any pos-

sible prejudice being brought to bear against him by complete strangers to the proceeding?

Appended hereto is a brief in support of this petition.

WHEREFORE, your petitioner, Sidney Kross, prays that a writ of certiorari may issue out of and under the seal of this Court to the Superior Court of Los Angeles County, State of California, commanding the said Court to certify and send to this Court for review and determination as provided by law, this cause and a complete transcript of the Record and all proceedings had herein, as heretofore remitted to the said Superior Court of Los Angeles County, by the District Court of Appeals, Second District, State of California, and that the order of the District Court of Appeals, Second District, State of California, affirming the judgment and order denying a new trial in this cause may be reversed, and that petitioner may have such other relief as this Court may deem appropriate.

Dated: October 22, 1952.

SIDNEY KROSS,
Petitioner;

By: IRVING I. ERDHEIM,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 407

SIDNEY KROSS,

Petitioner,

against

STATE OF CALIFORNIA,

Respondent

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Opinion Below

The Supreme Court of the State of California denied, without opinion, two justices dissenting, a petition for hearing the appeal from the District Court of Appeal of the State of California, Second Appellate District, which court had affirmed a judgment of conviction imposed upon petitioner and an order denying petitioner new trial.

Jurisdiction

The statement under which the jurisdiction of this Court is invoked, as well as the statement of the question presented, and the factual matter relevant to this application, appear in the petition to which this brief is annexed.

ARGUMENT

The petitioner urges that he has been convicted of the crimes of grand theft and burglary in the second degree and sentenced to the state penitentiary, as the result of a trial in which the trial justice refused to grant a motion for a new trial, or, in the alternative a mistrial, based upon the conduct and prejudicial comments of certain press photographers and reporters in attempting to photograph the petitioner in the courtroom against his will and in the presence of at least four jurors who remained in the jury box after the court had recessed, all of which worked a denial of a fair trial to the petitioner as guaranteed by the due process clause of the Fourteenth Amendment to the Constitution of the United States.

Point I

The Refusal to Grant a New Trial or Mistrial in View of the Highly Prejudicial Conduct and Statements of Photographers and Newsmen Towards the Petitioner in the Presence of at Least Four Members of the Jury Was a Violation of the Rights of the Petitioner Under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

The question here presented is whether the conduct of strangers to the trial was so prejudicial to the rights of the petitioner as to be tantamount to a denial of a fair trial guaranteed by the due process clause of the Fourteenth Amendment to the Constitution of the United States.

On the second day of the trial, shortly after court was convened on that date, the trial justice hurriedly announced a short recess and retired to his chambers at which time at least four jurors remained in the jury box (Fol., 739-748).

Immediately thereafter, a group of newspaper photog-

raphers and television camera men rushed up to the counsel table and well within the visible and audible range of the remaining jurors, the bailiff and the prosecutor, took pictures of petitioner despite his strenuous protests and tried to force him to expose his face to their lenses (Fol., 740). In addition thereto, the said persons plagued the petitioner to favor their papers with a photograph of him wearing his oversized pants which the prosecution had characterized as the depository in which the petitioner allegedly had concealed the fruits of his larcenous endeavors. In the course of this invasion of petitioner's right of privacy, a great deal of conversation was indulged in by the gentlemen of the fourth estate, making sundry comments and remarks in full view and hearing of the said jurors. Among the comments made during this time was in substance, the following:

> "Come on let's take your face and your baggy pants together, what are you hiding your face for. Come on lift it up and let's take a picture of you. What's the matter with you. The jury will think you are guilty. These pictures of you hiding your face won't do you any good with the jury. Let's see your face" (Fol., 740).

Also, during this time, other jurors were approaching the jury box. Many other remarks were made and epithets hurled which are too numerous to mention.

The foregoing was uncontradicted by the prosecutor who even stipulated the four jurors were in the courtroom and that he was present. Petitioner's trial counsel immediately reported the aforesaid incident to the trial justice in his chambers, the latter stating, at the time, that he had heard the noise and confusion in his chambers and that he would recess the court until 2:00 P. M., at which time he would grant a mistrial, and, in the interim, counsel could confer

with his client and the court would peruse the authorities with regard to the subject of double jeopa rdy (Fol., 746). None of the foregoing facts have been co ntroverted. At the end of the said recess, counsel for petiti ioner duly made a motion for a mistrial based upon the pre judicial conduct of the photographers and newsmen in the p presence of several members of the jury (Fol., 248). Contr ary to his statement made in chambers in the presence of p petitioner's trial counsel, the trial judge denied petitioner's m motion, although he did admonish the jury against consider ing any part of the said unfortunate incident in deciding the issues to be presented to them (Fol., 252).

Thereafter, the petitioner made a motion for a new trial before the trial judge who denied this mo tion also, stating that:

> "It was an untoward and unfortuna ate event, but it is one which might have well been repe ated in the hallway, on the street, in the presence of one or more jurors, and the Court will have to assume tha t the jurors not only followed the admonition of the Co urt to disregard the event entirely but followed their o ath in returning a verdict based on the evidence intro oduced in Court and not that which they saw in new spapers, saw in the hallways or saw in the courtroom when the Court was not in session" (Fol., 749).

At the very outset, this Honorable Co urt must bear in mind that the incident referred to trans pired while the Court, though recessed, had been opened to transact the business of the day.

The court again recessed upon its retu rn to the bench after it had been informed of the occurr ence in question. Since the Court was still technically in se ssion, its duty of presiding over the trial and the particip ants therein and the conduct of all persons in attendance, had in no way terminated. The bailiff in attendance, w hen the acts and

conduct in question occurred, was under the direction of the presiding justice and the fact that the bailiff apparently let things get out of hand, as uncontrovertably established, should certainly not militate against the petitioner who did not have such control over the situation as the said servant of the court could have exercised with due diligence.

It is the duty of each and every presiding officer in every jurisdiction where justice and freedom are still cherished to conduct, or cause to be conducted, its courtroom in such a manner as to render inviolate, without leaving room for doubt, the fundamental rights and liberties of each and every individual who stands before it.

It is most reasonably conceived that there devolves upon a trial justice during the course of a trial a duty to supervise the withdrawal and entrance of all jurors before he leaves the bench lest they be exposed to influences and prejudices diametrically opposed to the fundamental rights of the parties and their constitutional guarantee.

The judge conducting a jury trial is not a mere moderator but is the governor of the trial for the purpose of assuring its proper conduct and he has the responsibility of striving for an atmosphere of perfect impartiality.

See:

Glasser v. *U. S.*, 315 U. S. 60;
Kretske v. *U. S.*, 313 U. S. 551;
Roth v. *U. S.*, 313 U. S. 551.

As was stated in *Glasser* v. *U. S.*, 315 U. S. 60, 71:

> "Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused."

A strict adherence to the above stated concepts of justice would have rendered nugatory just such a possibility as in this instance developed into actual fact.

No instruction, however pointed, could have cured the prejudicial impressions dramatically conveyed to the jurors. The fact that the trial justice was in chambers at the critical moment did not relieve him of the responsibility assumed by him in undertaking his sacred duty. To the extent that the court was convened for the business of the day, and four jurors were left in the box when the court retired, and that the court's attache, the bailiff, was present but failed to protect petitioner's rights, it must be said that the trial judge participated in the event.

In the light of the highly circumstantial nature of all of the evidence presented, from which only indirect references of guilt or the lack of it could reasonably be drawn, the event in question was sufficiently prejudicial to tip the scales of doubt in favor of the prosecution's case.

Cognizance must be taken of the make-up of the jury. A panel is comprised of persons of all walks of life, of varying foibles, sensitivities and resistancies to impressions and opinions of others. How far did the event in question go towards beating down the jury's resistance to adverse influences which might hinder their sworn duty to render a fair, impartial verdict? The average man has always been influenced by the press and public information services and necessarily the men who provide the news for public consumption are reasonably placed upon a higher plane of intelligence and respect than the average. Therefore, how much more relatively impressed is the average man when opinions, remarks and comments are made within his sight and hearing by these members of the press who are widely reputed to be well informed. This incident had an even more far reaching effect. No less a personage than the trial justice himself immediately upon being informed of the happening, indicated the high degree of prejudice which had been inflicted upon the petitioner when he stated in cham-

bers that he thought that the reported incident was prejudicial to the petitioner and that he would grant a mistrial. The opinion of the trial justice with respect thereto was even more sharply emphasized when he stated that he wished to make inquiry into the authorities on the question of double jeopardy.

Therefore, the facts herein related raise a question of law both fundamental and far reaching.

The question presented for this Court's determination was set forth at the very outset of Point I.

This Court has heretofore stated that:

> "As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice."
>
> *Lisenba* v. *California*, 314 U. S. 219, 237.

It is respectfully submitted that, in view of the facts, "that fundamental fairness" was here denied to the petitioner when his motion for a mistrial, and later for a new trial, was denied.

In an earlier case, this Court made specific reference to a circumstance and the law applicable thereto, closely akin to the case at bar. The Court there stated:

> "Private communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officer in charge are absolutely forbidden, and invalidate the verdict, at least unless their harmlessness is made to appear."
>
> *Mattox* v. *U. S.*, 126 U. S. 140, 150.

It is respectfully submitted that the law above quoted is applicable hereto. The "harmlessness" of the events in issue were never shown here; but, to the contrary, the trial justice himself indicated in chambers that resulting prejudice was possible by stating that he would look into the

authorities on the question of double jeopardy and that he would grant a mistrial.

If remarks are made within the hearing of jurors by strangers to the litigation, which remarks might probably influence the verdict, a new trial should be granted.

66 Corpus Juris Secundum, Section 51, P. 165.

The Federal District Court for the Eastern District of Pennsylvania has stated that:

> "It is an attack upon the prisoner's constitutional rights to influence the jurors by presenting to their minds charges against him of which no evidence has been offered, or by urging upon the jurors, or suggesting to them, that the defendant is guilty and ought to be convicted."
>
> *U. S.* v. *Ogden*, 105 Fed. 371.

It is respectfully submitted that what transpired on the day in question was of sufficient suggestive force as to give rise, in the minds of the jurors present, the possibility or probability of petitioner's guilt. This possibility or probability is enhanced by the fact that where a purely circumstantial case is presented to the jury, as in the case at bar the juror's doubt, which is a normal reaction in that type of case, may well be influenced and resolved by just such circumstances as were presented during the trial of this case

Conclusion

The probability of prejudice permeating the deliberations of the jurors was clear, present and imminent to such a degree that a refusal to grant either a mistrial or new trial effected a denial to the petitioner of a fair and impartial trial within the concept of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

For all of the foregoing reasons, and in consonance with the decisions rendered by this Court, a writ of certiorari should be granted.

Respectfully submitted,

IRVING I. ERDHEIM,
Counsel for Petitioner.

ROBERT F. ARMSTRONG,
EDWARD M. CHAPIAN,
Of Counsel.

APPENDIX A

UNITED STATES CONSTITUTION, AMENDMENT XIV, SECTION 1

"nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

APPENDIX B

Title 28, Sec. 1257, U. S. Code

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

"(3) By writ of certiorari where any right, privilege or immunity is specially set up or claimed under the Constitution of the United States."

APPENDIX C

FEDERAL RULES OF CRIMINAL PROCEDURE: RULE 53. REGULATIONS OF CONDUCT IN THE COURT ROOM

"The taking of photographs in the Court room during the progress of judicial proceedings or radio broadcasting of judicial proceedings from the Court room shall not be permitted by the Court."

APPENDIX D

McKINNEY'S CONSOLIDATED LAWS OF NEW YORK, CIVIL RIGHTS LAW, SECTION 52

"No person, firm, association or corporation shall televise, broadcast, take motion pictures or arrange for the tele-

vising, broadcasting, or taking of motion pictures within this state of proceedings, in which the testimony of witnesses by subpoena or other compulsory process is or may be taken, conducted by a court, commission, committee, administrative agency or other tribunal in this state.

"Any violation of this section shall be a misdemeanor."